Editor's note: Appealed -- remanded, Civ. No. 72-246 JWC (C.D. Calif. May 18, 1972), aff'd, No. 72-2342 (Oct. 25, 1974), 505 F.2d 246; See US v. Richard Haskins, 59 IBLA 1 (Oct. 30, 1981); aff'd, Civ.No. 82-2112 (C.D.Cal. Oct. 30, 1984).

UNITED STATES OF AMERICA
v.
RICHARD P. HASKINS

IBLA 70-507 Decided July 30, 1971

Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

Where a case has been remanded to the Department to consider whether a statement of reasons, mailed four days late, should be accepted in the light of the regulation reciting that the late filing of a statement of reasons "will subject the appeal to summary dismissal," discretionary authority will not be exercised favorably unless it has been shown that there were good and cogent reasons for the delay.

Rules of Practice: Appeals: Dismissal

Even though failure to timely file a statement of reasons merely "will subject the appeal to summary dismissal," such failure will not be excused in the absence of a compelling showing, since it is the policy of the Department to require strict observance of the rules of practice to insure orderly procedure to all litigants before the Department.

Mining Claims: Contests

A motion by a contestee to stay all proceedings in a contest because of the filing of a mineral patent application for the same lands embraced in the contest proceedings, and assertedly based upon the holding of the land for the period of time prescribed by the State statute of limitations for adverse possession will be denied, since that patent application cannot breathe new life into the mining claims and mill sites at issue in the contest proceedings.

UNITED STATES OF AMERICA, Contestant, v. RICHARD P. HASKINS, BARTHOLOMEW J. HASKINS, Contestees.	:	Contest No. LA 0171292-L Reconsideration upon remand of dismissal of appeal
(Sub Nom. RICHARD P. HASKINS for himself and as ADMINISTRATOR of the ESTATE of BARTHOLOMEW J. HASKINS, deceased, Appellants, v. ROGERS C.B. MORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES, Appellee)	:	Dismissal affirmed

DECISION

By decision of June 18, 1965, a hearing examiner held the four mining claims and the two mill sites in issue to be null and void. The decision was served on Thomas W. Fredricks, then counsel for the contestees, on June 23, 1965. Notice of appeal was filed on July 9, 1965, with the hearing examiner's office at Sacramento. On July 21, 1965, that office received $30.00 from Fredricks as appellate filing fees. On August 13, 1965, the statement of reasons was mailed by Fredricks to the Director, Bureau of Land Management, Washington, D.C., where it was received August 16, 1965.

On September 28, 1966, the Bureau of Land Management dismissed the appeal because the statement of reasons "was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived." By letter of October 21, 1966, the Bureau of Land Management denied Fredricks' request for reconsideration of that decision.

The Assistant Solicitor, Branch of Land Appeals, in United States v. Richard P. Haskins, A-30737 (December 19, 1966), affirmed the decision of the Bureau of Land Management.

Haskins filed suit seeking judicial review of the Department's decision. He appealed to the 9th Circuit from the decision of District Court for the Central District of California, which dismissed the action. During the pendency of the appeal, a stipulation, dated September 29, 1969, was entered into by Hale C. Tognoni, attorney for the appellant, and Robert S. Lynch of the Department of Justice, and was approved by the court on October 3, 1969. 1/ Under that stipulation, the case was "remanded to the Director of the Bureau of Land Management 2/ for an exercise of discretion upon the question of whether the appeal should be dismissed or the late filing accepted," in the light of Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

Motions were filed with the Board on behalf of Haskins for oral argument 3/ and "To Stay Action" on the proceedings because of the filing of a mineral patent application, embracing and containing all the claims in issue, based upon 30 U.S.C. § 38 (1964) 4/. Before considering the motion to stay action, we proceed to consider the issue raised by the stipulation, i.e. whether the requirement to file timely the statement of reasons to the Director should be waived.

1/ The stipulation arose out of the case, identified above, No. 23130, in the 9th Circuit Court of Appeals.

2/ Authority to decide appeals to the Director, Bureau of Land Management, has been transferred to the Board of Land Appeals (211 DM 13.5; 35 F.R. 12081).

3/ The motion for oral argument was denied by the Board on June 8, 1971.

4/ That section reads as follows:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21-24, 26-28, 29, 30, 33-48, 50-52, and 71-76 of this title, in the absence of any adverse claim; but nothing in said sections shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent."

Tagala held that the regulation, 43 CFR 1842.5-1 5/, concerning a late filing of a statement of reasons did not require the dismissal of the appeal, but rather permitted the exercise of discretion in determining whether the appeal should be dismissed because of the late filing. Tagala dealt with a filing only one day late and stated that ". . . we do not regard the circumstances of this case as requiring as matter of law an exercise of discretion in favor of the late filing. Discretionary consideration then remains to be had and is the function of the Director and the Secretary rather than of the courts."

In his brief to the 9th Circuit 6/, Haskins stresses the fact that the statement of reasons was in fact filed August 16, 1965, within the 60 days from the date of the hearing examiner's decision, June 18, 1965. He points out that in Price v. Udall, 280 F. Supp. 293 (D. Alaska 1968) (which sub nom. Tagala v. Gorsuch, supra, was modified on appeal), that factor was recited in the decision. The District Court pointed out that the Department had uniformly dismissed appeals or statements of reasons filed one day late, and further stated, at pages 294, 295:

> It is uncontroverted that plaintiff expended a substantial amount of time, energy and money on the property. The record reflects, without serious challenge, that plaintiff cleared and cultivated the land during the years 1961, 1962, and 1963, and that she expended approximately $22,000.00 for improvements and clearing.
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> . . . .
>
> The Secretary's action in affirming the summary dismissal of plaintiff's appeal, considering the special factors present here, is found to

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5/ This designation was in effect in 1965. The current regulation, 43 CFR 4.412 (36 F.R. 7200) in essence recognizes that the Board of Land Appeals is the appellate body for land matters in the Department and reiterates that failure to file the statement of reasons within the time required (i.e. within 30 days after the filing of the notice of appeal) "will subject the appeal to summary dismissal" unless the document is actually filed within 10 days after it was required to be filed and it is determined that the document was sent or probably sent to the proper office within the 30-day period. See 43 CFR 4.401(a) (36 F.R. 7199-7200).

6/ Haskins has incorporated the brief by reference in support of his request for a favorable exercise of discretion.

> be arbitrary and capricious. To find otherwise would condone and continue a manifest injustice. [Emphasis supplied.]

Haskins also adverts to Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960) as controlling.

Pressentin held that the Department abused its discretion in dismissing an appeal to the Director, Bureau of Land Management from an adverse decision of a bureau hearing examiner in Portland which held invalid certain mining claims, for failure to file statement of reasons for appeal in the Washington, D.C., office of the Director within 30 days after filing notice of appeal, as required by the regulations. However, the appeal was timely filed; there were no jurisdictional defects; the statement would have reached Washington on time had it been sent airmail in lieu of regular mail; the statement would have been received in time if the Director had an "office" in Portland, Oregon; the hearing examiner in Portland had actually received a copy of the statement in time; and before the dismissal the Secretary had changed the regulations so that a statement of reasons for the appeal, if mailed within the 30-day period, and received within the 10-day period thereafter would be regarded as timely filed. In Pressentin, the statement of reasons was received in the Washington office of the Director on the Monday following the critical Friday, the 30th day after the date the notice of appeal was filed. The court stated, at page 199, that:

> The factors we have listed add up to the inescapable conclusion that, discretion being implicit in the controlling rule, and no prejudice to any one being shown or even claimed, this appeal, [7/] having been timely filed, should not have been dismissed for a technical, excusable delay over one weekend in the filing of the supporting statement of reasons. The Secretary's own amendment of the rule is enough to show the basic merit in the equity of appellants' position.

Cf. Delbert and George Allan, Eldon L. Smith, 78 I.D. 55 (1971), where the document was timely mailed.

7/ Presumably the court was adverting to the notice of appeal.

Haskins endeavors to bring his case within the ambit of the cited court decisions by asserting that (1) the contestees and their parents have expended a substantial amount of time, energy and money on the claims, citing Tr. 102 to 150; (2) the contestees have been associated with the mining claims for 56 years; (3) dolomite and fluxstone have been produced "in substantial quantities over the years as evidenced by the production of 15,000 to 18,000 tons since 1934 . . ."; (4) the statement of reasons was filed within the 60-day period, following the hearing examiner's decision; and (5) on August 16, 1965, the Department of Agriculture General Counsel's office stated they had read the statement of reasons and would file no reply.

With respect to Haskins' contention that a substantial amount of money has been expended on the claims, the portion of transcript cited by him would permit such an inference only by conjecture. That minerals on the order of 15,000 to 18,000 tons have been produced since 1934 is unrebutted in the record, but meaningful production terminated no later than 1940 (Tr. 126, 127, 136 and 145) and only truckload sales were made until 1960 (Tr. 129). In essence, Haskins is endeavoring to bring himself within the scope of Tagala, but the record lacks the precision for even affording an intelligent basis for an estimate of monetary expenditures. This case is distinguishable on that ground.

Pressentin and Tagala stand for the proposition that where a regulation provides that an appeal will be "subject to summary dismissal" for failure to file timely a statement of reasons for the appeal, the door is open to a consideration of the circumstances. Thus discretion is to be exercised not on an arbitrary basis, but in the light of the particular circumstances. See United States v. Lee H. Rice and Goldie E. Rice, 2 IBLA 124 (1971).

The age of the mining claims, the contestees' long association with them, the vague reference to substantial expenditures of money, the production of dolomite and fluxstone in substantial quantities up to 1940, and the intermittent sales of truckloads of those minerals up to 1960 do not, in our judgment, impel the conclusion that favorable action is warranted. It is true that both in the case at bar and in Price the statement of reasons was received within 60 days after service of notice of the adverse decision below. But in our judgment this factor does not require a favorable exercise of discretion.

In exercising discretion in late filing, one of the cogent considerations is the reason for, and the circumstances attending, the late filing. Haskins simply states that his prior attorney should have mailed the statement on August 9, 1965, but did not do so until August 13, 1965. No explanation of the failure to act timely is given.

Although this Board is not adverse to waiving such late filings in cases where a strong showing so warrants, we find the record does not afford a sufficient basis to grant relief here.

In Joe Lyon, Jr., A-27824 (January 14, 1959), the Department stated:

> The appellant has requested the Secretary to reinstate his appeal and consider the case on its merits under the rule which permits an extension of time or in the exercise of his supervisory authority. It has already been noted that the rule which describes the process of perfecting an appeal forbids an extension of the time for paying the filing fee. The appellant has merely asked to be relieved of the consequences of his failure to proceed in accordance with the rules. Strict observance of the rules of practice is necessary to insure orderly procedure to all litigants before the Department. Otherwise, the rules become only the whim of the person who administers them for the nonce. [Emphasis supplied.]

We find that no sufficient showing has been made to warrant favorable action.

As indicated earlier, the contestees filed a motion to stay all further proceedings herein pending the determination of whether Richard P. Haskins will be granted a mineral patent on his Haskins Quarries placer mining claim in Sections 27 and 28, T. 3 N., R. 14 W., S.B.M., Los Angeles County, California.

The Memorandum of Points and Authorities offered in support of the motion recites that on May 27, 1968, the Haskins Quarries Placer Mining Claim patent application was sent to the Riverside office of the Bureau of Land Management, but the filing of the application was refused because of the pending litigation concerning the four lode claims and the two mill sites. On May 29, 1969, the State

Director for California suspended the April 21, 1969, order for Mineral Survey No. 6788 because the ground encompassed by the Haskins Quarries placer mining claim is the same ground as is covered by the four lode claims and the two mill sites.

The memorandum asserts that the United States mining laws provide for two alternative exclusive methods of achieving valid mining locations: under 30 U.S.C. § 26 (1964), by location notice, and under 30 U.S.C. § 38 (1964), by holding for the time prescribed by the statute of limitations for mining claims of the State, for adverse possession.

The memorandum cites cases to establish the principle that such holding obviates proof of valid location notices and asserts that "it cannot reasonably be contended that a determination as to the validity or invalidity of the Lone Jack, Lap Wing, Lady Helen and Roger Williams lode mining claims under 30 U.S.C. § 26 is in any way dispositive as to whether or not Richard P. Haskins should be granted a mining patent on the Haskins Quarries placer mining claim."

The record shows that the Haskins Quarries mining claim, consisting of 85.1 acres, was included in a document, "Notice of Right to Patent Certain Mineral Rights Through Work and Possession," filed with the county recorder on May 2, 1968. The record shows also that the claim embraces the ground included in the four lode claims and two mill sites 8/, all of which were held to be invalid by the examiner. 9/

In essence, it is Haskins' view that in an endeavor to get patent for mining claims, an applicant has two bites at the apple: (1) under 30 U.S.C. § 26, by a mining location, and (2) under 30 U.S.C. § 38 (1964), by holding the land under the State statute of limitations.

8/ In applying for patent to land as mill sites, the appellant was asserting that the land therein is "nonmineral land." See 30 U.S.C. § 42 (1964). By including such land in the Haskins Quarries mining location, later located, he is inconsistently asserting that such land is mineral in character. Cf. Clarence H. Steussy, 58 I.D. 474 (1943).

9/ It is not clear what the legal basis is for attempting to file a placer claim for the same land for which Haskins is asserting that he holds valid lode and mill site locations. However, the propriety and validity of the asserted placer claim are not before this office for decision.

However, as counsel for the contestant has amply demonstrated in adverting to Cole v. Ralph, 252 U.S. 286, 306 (1920), 30 U.S.C. § 38 (1964) "was not intended . . . nor as now found . . . to be a wholly separate and independent provision for the patenting of a mining claim." See United States v. Alice A. and Carrie H. Boyle, 76 I.D. 318, 321 (1969).

Nor is the necessity of a discovery to sustain a mining location avoided by reason of this section. Id. In sum, the section was designed simply to lessen the burden of proving a location and transfer of old mining claims concerning which possessory rights of others were not disproven. Pepperdine v. Keys, 198 Cal. App. 2d 25, 17 Cal. Rptr. 709 (1961). It simply afforded in certain circumstances a conclusive presumption of possessory title.

Insofar as Haskins' application for patent based upon the "Haskins Quarries mining claim" is concerned, any rights 10/ he may have thereunder cannot breathe new life into the four lode claims and two mill sites. There is, therefore, no reason to grant the motion to stay action in the case at bar, and the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the appeal is dismissed and the case closed.

_____
Frederick Fishman, Member

We concur:

_____
Edward W. Stuebing, Member

_____
Anne Poindexter Lewis, Member

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10/ Under 30 U.S.C. § 35 (1964), a placer location is limited to 20 acres for an individual locator.